Nos. 00-568 & 00-809

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IN THE

Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK AND THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

ENRON POWER MARKETING, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF ENRON POWER MARKETING, INC. AS RESPONDENT IN NO. 00-568

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QUESTION PRESENTED IN NO. 00-568

By Order filed February 26, 2001, this Court granted certiorari with respect to the following question:

Whether, given that Congress in 1935 stated that federal regulation extends "only to those matters which are not subject to regulation by the states" (Federal Power Act (FPA) § 201)), and the transmission of energy from generators to retail customers in the same state was then "subject to regulation by the states" (as it has been since 1935), may the Federal Energy Regulatory Commission (FERC) preempt state jurisdiction over such intrastate retail transmission of electric energy?

PARTIES TO THE PROCEEDING

The list of parties before the court of appeals is set forth at No. 00-809 Pet. App. 683a to 688a.

RULE 29.6 STATEMENT

Enron Corp. is the only publicly held company owning 10% or more of respondent Enron's stock. The following companies are the parent companies of respondent:

Enron Corp.

Enron North America Corp.

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BRIEF OF ENRON POWER MARKETING, INC. AS RESPONDENT IN NO. 00-568

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 225 F.3d 667 (D.C. Cir. 2000) and reprinted at No. 00-809 Pet. App. 3a to 121a. FERC Order No. 888 is reported at F.E.R.C. Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (1996). FERC's rehearing decisions, Order No. 888-A and Order No. 888-B,

are reported respectively at III F.E.R.C. Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274 (1997), and 81 F.E.R.C. ¶ 61,248, 62 Fed. Reg. 64,688 (1997). Relevant portions of FERC Orders Nos. 888 and 888-A and FERC's Notice of Proposed Rulemaking (NOPR), F.E.R.C. Stats. & Regs. ¶ 32,514, 60 Fed. Reg. 17,662 (1995), are reprinted at No. 00-809 Pet. App. 125a to 644a.

STATUTES AND RULES INVOLVED

Sections 201, 205, 206, 211, 212, 213, and 313 of the Federal Power Act (FPA), 16 U.S.C. §§ 824, 824d, 824e, 824j, 824k, 824*l* and 825*l*, are reprinted in the Appendix at No. 00-809 Pet. App. 652a to 681a.

Sections 1, 4, and 5 of the Natural Gas Act (NGA), 15 U.S.C. §§ 717, 717c, and 717d, are reprinted in the Appendix at No. 00-809 Pet. App. 645a to 651a.

Relevant portions of FERC Orders Nos. 888 and 888-A are reprinted in the Appendix at No. 00-809 Pet. App. 125a to 551a.

STATEMENT

The Federal Power Act (FPA) gives the Federal Energy Regulatory Commission (FERC) jurisdiction over all "transmission of electric energy in interstate commerce" without any stated limitation. 16 U.S.C. § 824(b)(1). In the orders under review, FERC exercised this jurisdiction to prevent vertically integrated public utilities from using their ownership of the nation's interconnected high-voltage transmission facilities to discriminate against competing power suppliers needing access to those facilities. FERC ordered each utility to file an open access transmission tariff (OATT) and to take transmission service for its own wholesales and (where a state requires or the utility voluntarily offers unbundled retail service) unbundled retail sales on the same terms of access and usage as its transmission-dependent competitors. In an era in which

competing suppliers and users must all use interconnected grids with limited capacity, federal regulation of the terms of access to and usage of the grids pursuant to the authority granted in the FPA is indispensable to workable, nondiscriminatory operation.

Petitioners State of New York et al. (New York) argue that FERC's orders are an unlawful "preemption" of state jurisdiction over retail sales of electricity. But FERC has not exercised any authority over retail sales. The fact that FERC's rules governing access to and usage of transmission facilities may affect the utility's cost for transmission, which is one of the costs a utility incurs to provide retail electric service, does not mean that FERC has regulated any aspect of retail sales or taken any jurisdiction from the states. FERC's regulation of interstate transmission leaves the states' jurisdiction over prices and other terms of retail sales of energy to end users entirely intact.

New York's legal premise, that FERC's transmission jurisdiction is limited to transmissions for "wholesales," reads into the FPA a limitation that Congress intentionally omitted. New York's further suggestion that transmissions on the Nation's two multi-state grids can be teased into separate (and separately regulatable) intrastate and interstate components ignores the fact that the grids are operated as synchronized, interstate networks, and the energy on these grids does not observe state borders. *Every* use by a user connected to a grid draws on every generator connected to that grid, wherever located. There is no such thing as a purely intrastate transmission on the interstate grids. To permit the forty-eight contiguous states to regulate "their" portions of the transmission grids as separate fiefdoms—and to permit them, in times of shortage, to hoard capacity for their in-state customers or prevent electricity from leaving the state—threatens the transmissibility of electric power throughout the country that federal regulation is designed to

promote as well as the competitive electricity markets that Congress sought to effectuate.

A. The Interstate Electric Transmission Grids

Three broad categories of facilities are used to provide electricity to end users. *Generation* facilities produce electric energy. Networks of high-voltage *transmission* lines carry electricity from the generators to local distribution points. After the electricity is stepped down to lower voltages, *local distribution* facilities deliver electricity from the distribution points to end users. Although the broad distinction between high-voltage transmission facilities and low-voltage local distribution facilities is generally understood and has long been recognized by this Court, *see Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 534-35 (1945), the exact demarcation is a matter of definition.

Today, the transmission facilities in every state (except Alaska, Hawaii, and part of Texas) interconnect into two large reticulated grids, the Eastern and Western Interconnections. *See* Steven M. Kramer & Bret A. Sumner, *Electric Reliability in North America: Cross-Border Implications*, 14 Nat. Resources & Env't 81, 82 (1999); *see also* Order No. 888 at 31,781, Pet. App. 305a n.541.[1] Most parts of these grids are owned by the vertically integrated public utilities that have traditionally provided electricity to their local customers on a regulated-monopoly basis. *See* Order No. 888 at 31,652, Pet. App. 172a. The utilities use these facilities for bulk transmissions of the electric energy that they sell either at wholesale (i.e., to entities that in turn resell) or at retail (i.e., to end users who receive electricity via the utilities' local distribution systems). Other power suppliers that compete against the vertically integrated

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[1] All citations in this brief to "Pet. App." are to the Petitioner's Appendix filed with Enron's Petition for a Writ of Certiorari in No. 00-809.

utilities depend on the same transmission facilities to carry electricity to their customers.

Although customers and suppliers enter into bilateral contracts for the delivery of specific quantities of electricity, these contractual arrangements bear no resemblance to the physical behavior of electricity on the grids. A unit of electricity is not a discrete object that flows from a particular source to a particular buyer or user over a particular route, and a supplier generating electricity cannot prescribe the route over the grid that "its" electricity will follow. Each multi-state interconnection operates as a single pool of energy, into which generating facilities (wherever located) deposit electric energy, and from which customers (wherever located) draw it down.[2] Every connected use draws to some degree on every connected source, as the grid balances supply and use to ensure that the frequency of electric energy in the grid is maintained at a standard level, generally 60 cycles per second (or a multiple thereof). *See Florida Power & Light Co.*, 37 F.P.C. 544, 548, 564-65 (1967). "[A] load change at any point will have an effect on the instantaneous generation and frequency at every point on the interconnected system." *Id.* at 565. A sudden surge of use in Boston, or a downed high-voltage transmission line in New York, impacts electric operations in every state in the Eastern Interconnection. *See id.* at 548-50.

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[2] In this respect, the electricity network is very different from, for example, the telephone network. When one telephone caller dials another, the switches in the telephone network establish a dedicated circuit between them that remains open for the length of the call, and all communications between the callers travel over this fixed open pathway. By contrast, when a generating utility contracts with an end user to deliver electricity, nothing travels on any path between them: the utility generates an additional amount of electric energy for the grid, and the end user withdraws a corresponding amount of electric energy from the grid. *See Florida Power & Light Co.*, 37 F.P.C. 544, 548, 567 (1967).

B. Statutory Background

Early in the Twentieth Century, because electricity could be produced in many places but could not be successfully transmitted over long distances without substantial losses, the electricity business was almost entirely local. *See Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 681 (D.C. Cir. 2000), Pet. App. 9a; Order No. 888 at 31,639, Pet. App. 141a. Vertically integrated utilities, mostly confined to single states, each generated, transmitted, and distributed their own electricity, selling it to their retail customers on a bundled basis. "The industry consisted of independent, unassociated, local units [and] its piecemeal and planless development resulted in an uneconomic division of territory, wasteful overlapping of facilities, and lack of engineering and economic unity." Memorandum of Oswald Ryan, General Counsel of the Federal Power Commission (FPC), and Dozier A. DeVane, Solicitor of the FPC (Ryan-DeVane Memorandum), in *Public Utility Holding Company Act of 1935: Hearings on S. 1725 Before the Senate Comm. on Interstate Commerce*, 74th Cong. at 797 (1935).[3]

However, utilities gradually began to interconnect their generation and transmission facilities into regional networks. Interconnection permitted utilities to draw on more generation resources to meet variations in local demand and to achieve economies of scale by serving larger areas, allowing the utilities to enhance the reliability and profitability of their services. Increasingly, these networks crossed state lines; by 1933, roughly a dozen states either imported more than half their electricity from other states or exported more than half the power generated in-state to other states. *See* Ryan-DeVane Memorandum at 798 n.1.

Still, each of these regional networks grew in isolation. There was no coordinated planning of these networks,

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[3] The Ryan-DeVane Memorandum summarizes the history of the industry up to 1935.

because no regulator exercised jurisdiction over interstate transmission: "Electricity crossing State lines is in a no-regulation land, unrestrained by the power of the State which may not constitutionally control it, and unrestrained by the power of the Federal Government, which has not attempted to control it." *Id.* at 798. As a result, transmission capacity *among* these regional networks was very inadequate. During World War I, for example, many regions of the country suffered power shortages because there was insufficient transmission capacity to import electricity from areas with adequate supplies. *See id.* (quoting War Department findings that "owing to lack of flexible and capacious interconnections between adjacent power systems it was virtually impossible to reduce this shortage . . . by taking advantage of the diversity factor and by releasing for active use part of the installed reserves which interconnection would have rendered safely available"). The consensus among federal policymakers in the mid-1930s was that inadequate transmission capacity threatened the health of the economy by preventing utilities from taking advantage of non-local lower-cost generation sources and by forcing them to maintain uneconomically high local reserves of generation capability. *See id.* at 798-800 (collecting sources).

The legislative hearings and debates leading to the adoption of the FPA in 1935 established the strong need for *federal* action to encourage and oversee the interconnection of transmission facilities. *See id.* at 800; *see also Public Utility Holding Cos.: Hearings on H.R. 5423 Before the House Comm. on Interstate and Foreign Commerce*, 74th Cong. at 2129 (1935) (*Hearings on H.R. 5423*) (statement of Dozier A. DeVane, Solicitor of the FPC) ("[J]ust as the original impetus to interconnection was given by the Government during the World War in requiring any company having excess capacity to transmit its surplus current to nearby territory in need of it, now the [federal] Government must take the lead if we are to achieve the unification desired in the new war upon economic waste and instability,

unemployment, and the progressive destruction of basic natural resources.") (internal quotations and citation omitted). As the General Counsel and Solicitor of the FPC then noted, "the vast saving to be accomplished by the proper coordination of power facilities, and the need for a centralized control of the coordination process furnishes a formidable basis for the exercise of congressional power." Ryan-DeVane Memorandum at 800; *see also Hearings on H.R. 5423*, at 384 (statement of Clyde L. Seavey, Commissioner of the FPC) (the FPA "is designed to secure coordination on a regional scale of the Nation's power resources").

In the FPA, Congress accordingly declared that "the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation . . . of that part of such business which consists of the transmission of electric energy in interstate commerce . . . is necessary in the public interest." 16 U.S.C. § 824(a). Congress gave FERC's predecessor, the FPC, jurisdiction over all "transmission of electric energy in interstate commerce" and all "facilities" used for such transmission. *Id.* § 824(b)(1). It defined electric energy "in interstate commerce" as energy "transmitted from a State and consumed at any point outside thereof." *Id.* § 824(c). The FPC was also given the authority to establish regional industry councils to coordinate the development of the grid and was empowered to order utilities to interconnect their transmission facilities with one another. *See id.* §§ 824a(a)-(b).

The FPA addressed other problems in the electric industry as well. Congress gave the FPC jurisdiction over "the sale of electric energy at wholesale in interstate commerce," a second area where there was a gap between state and federal authority. *Id.* § 824(b). The phrase "at wholesale" was applied to *sales* in order to provide a "bright line" between sales transactions subject to FPC jurisdiction

and sales transactions regulated by the states.[4] The qualifier "at wholesale" was not applied to *transmissions* in interstate commerce, all of which were made subject to the Commission's jurisdiction. *See* Order No. 888 at 31,969, Pet. App. 338a ("statute . . . makes no distinction between wholesale transmission and retail transmission").

In addition, the FPA commanded the FPC to remedy "undue discrimination." Specifically, section 205 of the FPA, 16 U.S.C. § 824d, bars any public utility, "with respect to any transmission or sale subject to the jurisdiction of the Commission," from "grant[ing] any undue preference or advantage to any person or subject[ing] any person to any undue prejudice or disadvantage," *id.*, and requires each utility to file schedules setting forth its "practices," *id.* § 824d(c). Section 206(a), 16 U.S.C. § 824e(a), directed the FPC, whenever it determined that a practice was "unjust, unreasonable, unduly discriminatory or preferential," to cure the discrimination: the FPC "shall determine the just and reasonable . . . practice . . . to be thereafter observed and in force, and shall fix the same by order."

The structure of the electric industry changed dramatically in the last decades of the Twentieth Century. In response to the energy crisis of the 1970s, Congress adopted two statutes—the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601 *et seq.* (PURPA), and the Energy Policy Act of 1992 (EPAct), codified in pertinent part at 16

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[4] *See FPC v. Southern California Edison Co.*, 376 U.S. 205, 211-12 (1964). As the Court there explained, with respect to sales, Congress was responding to the Court's decision in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), holding that the Commerce Clause barred states from regulating interstate wholesales. The wholesale/retail "bright line" served to distinguish jurisdictional from nonjurisdictional sales without case-by-case adjudication of Commerce Clause issues. There is no comparable distinction with respect to interstate transmissions, all of which are part of interstate commerce and have been subject to federal regulation since 1935. There is therefore no need for a "bright line" with respect to transmissions.

U.S.C. §§ 824j-824m—designed to encourage independent wholesale power suppliers to enter the market in competition with the traditional utilities. *See* Order No. 888 at 31,642-45, Pet. App. 147a-156a. These steps were extremely successful: by the early 1990s, "generating capacity added by independent producers exceeded capacity added by utilities." *Id.* at 31,643, Pet. App. 151a (citation omitted). Other competing suppliers also grew, including many traditional utilities that became electricity generators and marketers outside their "native" areas. *See id.* at 31,639, 31,641, Pet. App. 141a, 147a. Thus, the generation and marketing of power became the subjects of increasingly intense interstate competition. *See id.* at 31,635, 31,645-46, Pet. App. 131a-132a, 156a-157a.

With the boom in the number of competitive suppliers came a greatly increased demand for access to the interstate transmission grids. To reach their customers, the new suppliers of electric power needed to be able to purchase transmission services from their chief competitors, the traditional vertically integrated utilities that continued to own most segments of the interstate grids.[5] But grid owners had the incentive and the ability to cripple the new competitors by reserving their transmission facilities for their own transmissions and forcing competitors to make more expensive alternative transmission arrangements, or by manipulating the transmission "curtailment" process to bar competitors' power from the system during periods of system overload. FERC initially exercised its jurisdiction to regulate access to and usage of the interstate transmission grids by ordering transmission on a case-by-case basis under section 211 of the FPA, which authorizes FERC, upon application, to

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[5] FERC found that "these entities needed transmission service in order to compete in electricity markets." Order No. 888 at 31,643, Pet. App. 150a. In order for there to be competitive power markets, "all wholesale buyers . . . must have equal access to the transmission grid." NOPR at 33,049, Pet. App. 558a.

order a transmission owner to provide transmission services to other suppliers and marketers. *See* Order No. 888 at 31,646, Pet. App. 157a-159a. FERC soon found, however, that the problem of discrimination was too widespread and entrenched for case-by-case resolution, and it began a rulemaking to address the problem on an industry-wide basis. *See id.* at 31,673, Pet. App. 191a-193a.

C. The FERC Orders at Issue

In Order No. 888 and, on rehearing, Order No. 888-A, FERC found that the traditional utilities that own much of the interstate transmission grids have inherent incentives to discriminate against other suppliers and are actually doing so. Structural characteristics in the industry "make it inevitable that [the transmission-owning utilities] will act in their own self-interest to the detriment of others by refusing transmission and/or providing inferior transmission to competitors." Order No. 888 at 31,682, Pet. App. 214a; Order No. 888-A at 30,210, Pet. App. 436a. FERC found that vertically integrated utilities had in fact acted to harm competitors and competition, citing an "array of allegations and circumstances raised by customers in individual cases over the years." Order No. 888-A at 30,210, Pet. App. 435a. Examples in the record included refusals to transmit, dilatory tactics amounting to refusals to transmit, and refusals to offer comparable service. *See* Order No. 888 at 31,919-26, Pet. App. 315a-331a.

FERC recognized that, under sections 205 and 206 of the FPA, "it is our duty to eradicate unduly discriminatory practices." *Id.* at 31,682, Pet. App. 214a. In the current proceedings, FERC determined that a broad remedy was necessary because there was "more than sufficient reason to believe that transmission monopolists . . . will continue to engage in unduly discriminatory practices, unless we fashion a remedy to eliminate their ability and incentive to do so." *Id.* at 31,683, Pet. App. 216a-217a. FERC also held that it

had jurisdiction to adopt a remedy addressing interstate transmissions at wholesale and at retail when the retail service is unbundled: "Unlike our jurisdiction over *sales* of electric energy, which section 201 of the FPA specifically limits to sales at wholesale, the statute does *not* limit our *transmission* jurisdiction over public utilities to wholesale transmission." *Id.* at 31,781, Pet. App. 305a (emphasis added). "[W]hen a retail transaction is broken into two products that are sold separately," FERC held, "we believe the . . . unbundled transmission service involves *only* the provision of 'transmission in interstate commerce' which, under the FPA, is exclusively within the jurisdiction of the Commission." *Id.*, Pet. App. 306a.

The remedy FERC fashioned was "functional unbundling." FERC required every public utility to adopt and take service under an "open access transmission tariff" (OATT) containing terms to be applied to all transmissions for wholesale sales and *un*bundled retail sales. *Id.* at 31,654, 31,781, Pet. App. 178a, 306a. (Respondent Enron's separate petition in No. 00-809 challenges FERC's failure to apply the same requirement to transmissions for *bundled* retail sales.) The tariff covers conditions of access to and usage of the grid, such as reservation of capacity, scheduling of transmissions, and rules of priority when system conditions require curtailment of transmission. *See id.* at 31,721-44, 31,749-50, Pet. App. 254a-264a, 276a-278a; Order No. 888-A at 30,278-79, Pet. App. 456a-460a. FERC also required each utility to "state separate rates for wholesale generation, transmission, and ancillary services." Order No. 888 at 31,654, Pet. App. 178a. In sum, the OATT established that when a utility is selling at wholesale, or at retail on an unbundled basis, it must take transmission for itself on the same terms it offers to others.

At the same time, FERC acknowledged that its jurisdiction over high-voltage interstate transmission facilities did not extend to low-voltage local distribution

facilities, and it expressly noted state jurisdiction over the latter. *See id.* at 31,770-71, Pet. App. 281a-282a. FERC adopted a seven-factor test for distinguishing interstate transmission facilities from local distribution facilities, and it permitted the states to recommend precisely where to draw the jurisdictional line. *See id.* at 31,771, 31,783-84, Pet. App. 282a-283a, 311a-312a.

D. Proceedings in the D.C. Circuit

On petitions for review, the D.C. Circuit upheld FERC's orders against challenges that they exceeded FERC's jurisdiction. *See Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 681, 687 (D.C. Cir. 2000) (*TAPS*), Pet. App. 8a-9a, 20a-21a. The State of New York and other parties contended that FERC has no jurisdiction over interstate transmission for *any* retail sales, even unbundled ones. The D.C. Circuit rejected this contention, holding that the FPA confers jurisdiction over unbundled interstate transmission of electric energy whether it is then sold at wholesale or retail. *See* Pet. App. 34a-35a. The court noted that "[t]he Supreme Court has interpreted the language in FPA § 201 regarding FERC's jurisdiction over transmissions in interstate commerce" and that it was "bound by the High Court's dictates to conclude that the FPA gives FERC the authority to regulate the transmissions at issue here, whether wholesale or retail." *Id.* at 34a. Even if this Court had been silent and the FPA were ambiguous, the D.C. Circuit held, "we would be hard pressed to conclude that FERC's interpretation of § 201[ ] as giving it jurisdiction over both wholesale and retail transmissions is unreasonable or impermissible." *Id.* at 35a.

The D.C. Circuit also upheld against state challenge FERC's seven-factor test for distinguishing between interstate transmission facilities and local distribution facilities, which it called a reasonable construction of the FPA. *Id.* at 38a-39a. New York petitioned for certiorari

from this ruling, No. 00-568, but the Court did not grant that portion of New York's petition. *New York v. FERC*, 121 S. Ct. 1185 (2001).

SUMMARY OF ARGUMENT

Since its adoption in 1935, the FPA has given FERC jurisdiction over interstate transmission of electricity and required it to eliminate undue discrimination in access to and usage of the facilities used to provide such transmission. Recent sweeping changes in the structure of the electric industry—the interconnection of virtually all transmission facilities in 47 states into two interstate networks, and the proliferation of competitive suppliers needing access to these grids—have increased both the amount of transmission subject to FERC's statutory jurisdiction and the need for FERC to exercise its authority. But there is no need to change the definition of FERC's jurisdiction adopted in 1935. New York's suggestion that FERC has reinterpreted the FPA to preempt state authority over retail electricity rates seriously mischaracterizes the orders under review and ignores the FPA's language. Moreover, state-by-state regulation of the nation's interstate grids would be a practical impossibility and a recipe for state-against-state discrimination.

I. Section 201(b) of the FPA gives FERC plenary authority over "the transmission of electric energy in interstate commerce," as well as the facilities used to provide such transmission, without any stated limitation. Since every act of consumption by a customer connected to an interstate grid draws on every generator on that grid, wherever located, *all* electricity on the interstate grids is "transmi[tted] . . . in interstate commerce" as a physical and legal matter. New York's claim that the uses of these grids can be teased into intrastate and interstate parts is unworkable. New York's further suggestion that FERC's jurisdiction is limited to "wholesale" transmissions reads language into the FPA that

is not there (and, indeed, that Congress consciously omitted); the state's snippets from the legislative record do not support its case and cannot override the language of the statute. Finally, amicus California's argument that there is no such thing as an interstate transmission facility—that every transmission over a grid for retail sale is state-jurisdictional "local distribution" regardless of how many states it crosses and how high the voltage at which it is carried—ignores the FPA's, and the orders', express distinction between transmission and distribution.

II. The states' argument that FERC has usurped traditional state regulatory authority has no merit. FERC's orders prescribe nondiscriminatory terms of access to and usage of the nation's interstate transmission grids, something the states have never done. The fact that these access and usage terms may affect the cost of one component of retail electric service does not mean that FERC has invaded the states' authority to set retail rates and terms; state ratemaking has always had to respect the costs that FERC approves for the facilities and services in its jurisdiction. The orders expressly disclaim any intention to regulate distribution facilities and contain a test specifically designed to distinguish between the proper spheres of federal and state regulators.

III. FERC adopted the orders after concluding that the vertically integrated utilities that own the transmission lines comprising the Nation's two interstate grids engaged in widespread discrimination against independent power suppliers, and that industry-wide open access tariffs were the only means for ending this discrimination. Individual states could not legally, and cannot practically, address the problem. State regulation would encounter formidable problems under the Commerce Clause if states attempted to prescribe detailed terms of access to and usage of the interstate grids. Moreover, state-by-state regulation of interstate transmission would, as promised by amicus

California, lead to attempts by individual states to reserve electricity and transmission capacity for their own customers at the expense of non-residents, threatening the free movement of electricity across the nation to the areas facing shortages. Finally, the interstate grids operate (and must be operated) as unified interstate wholes; it is unrealistic to expect separate regulation by each of the states to result in workable rules for access and use.

ARGUMENT

FERC found that the utilities that own and operate the facilities over which electricity is transmitted in interstate commerce engage in pervasive "undue discrimination" in favor of their own uses and against competing uses of their transmission facilities. To remedy this (in part), FERC ordered each owner or operator to publish an OATT and to take interstate transmission for itself on the same terms it offers to others. Petitioner New York argues that (i) transmissions over the interstate grid for retail sales are for the most part not physically in interstate commerce and (ii) the "bright line" separating federal jurisdiction over wholesale *sales* from state jurisdiction over retail *sales* also applies to *transmissions*, barring FERC from regulating transmissions for retail sales. Amicus California[6] argues that

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[6] California represents its interest as amicus curiae as arising from the "electric utility disaster" that has befallen the Golden State, which California implies was caused by its ceding "to FERC regulatory jurisdiction over the [unbundled] retail transmission facilities of the State's three large investor-owned electric utilities." (Cal. Br. at 1.) Nothing could be further from the truth. It is widely recognized that, apart from the effects of low rainfall causing a shortage of hydroelectric generating capability, California's debacle was self-inflicted. Specifically, the California legislature and Public Utilities Commission caused the "disaster" by (1) requiring its utilities to purchase all of their power needs from two short-term exchanges at price-decontrolled wholesale prices and to resell that power to retail customers at regulated prices that turned out to be lower than the wholesale prices; and (2) doing this in a power market that had become supply constrained by the State's

(iii) interstate transmission, no matter the voltage or the number of states traversed, is part of "local distribution" if the ensuing transaction is at retail. All of these arguments are wrong: FERC may, only FERC can, and FERC must remedy the undue discrimination FERC found, so as to protect competition among suppliers and assure the efficient availability of electricity throughout the Nation.

I. FERC HAS JURISDICTION OVER ALL TRANSMISSIONS OF ELECTRIC ENERGY OVER THE INTERSTATE TRANSMISSION GRIDS.

New York argues that FERC lacks statutory jurisdiction to apply the OATT to transmissions for retail sales because (A) much of the electricity assertedly does not cross state lines and (B) in any event such transmissions are components of the retail sales and hence subject only to state regulation. Amicus California argues that (C) such transmissions are part of state-regulated "local distribution." All of these arguments ignore the plain language of the FPA and are wrong: no one quarrels with the states' exclusive jurisdiction over retail sales and over local distribution, but interstate

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refusal to permit the development of new generating capability, despite the burgeoning demand of a booming economy. *See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange*, 93 F.E.R.C. ¶ 61,121, at 61,351, 61,353, 61,360 (2001) (detailing disaster's causes); *see also* California State Auditor, *Energy Deregulation: The Benefits of Competition Were Undermined by Structural Flaws in the Market, Unsuccessful Oversight, and Uncontrollable Competitive Forces* 1-4 (Mar. 2001) (attributing California disaster to flawed state legislation and its implementation); S.A. Van Vactor & F.H. Pickel, *Money, Power and Trade: What You Never Knew About the Western Energy Crisis*, 139 Pub. Util. Fort. 32 (2001) (concluding that the California disaster was caused by poor planning, drought, excessive reliance on the spot market, and because "the richest state in the richest country in the world does not want to pay its bills").

transmission is a distinct activity that has been clearly subject to federal regulation since 1935.

A. All Transmissions of Electric Energy on the Interstate Grids Are "in Interstate Commerce" As Defined in the FPA.

Section 201(c) of the FPA, 16 U.S.C. § 824(c), provides that electric energy is deemed to be transmitted "in interstate commerce" if it is "transmitted from a State and consumed at any point outside of the State." New York seizes upon this definition to argue (NY Br. at 43-45 & nn.27, 28) that FERC has jurisdiction over only the particular "electrons" that cross state lines. This argument, which is contrary to several consistent decisions of this Court, misunderstands both the science of electric energy and the definition in section 201(c).[7]

This Court has made it clear that whether electricity is consumed in a state other than the generating state depends on "an engineering and scientific, rather than a legalistic or governmental" test. *See Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 529 (1945) (*CL&P*). Under this test, all transmissions over an interstate grid are in interstate commerce because electric energy from every generator connected to an interstate grid becomes part of a pool of energy that serves all load requirements. "All of the electric energy produced by all the generating units [on an interconnected system] is delivered to the common coordinated and integrated modern transmission system from which all of the customers are supplied." *Florida Power & Light Co.*, 37 F.P.C. 544, 566 (1967). The operator of a particular generator cannot control the flow of "its" electricity to a particular end user and, conversely, a given

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[7] California, eager to conflate interstate transmission with local distribution (as to which *see infra* pp. 28-31) insists exactly to the contrary. It expressly acknowledges the "technologically expansive scope of transmission in interstate commerce." (Cal. Br. at 11.)

user is served not by energy from a particular generator, either in or out of state, but by all generators connected to the grid. "[I]f a housewife in Atlanta on the Georgia system turns on a light, every generator on Florida's system almost instantly is caused to produce some quantity of additional electric energy which serves to maintain the balance in the interconnected system . . . ." *Id.* at 567-68, *quoted in FPC v. Florida Power & Light Co.*, 404 U.S. 453, 460 (1972) (*FP&L*).

This Court has recognized this "engineering and scientific" truth. In *CL&P*, the Court noted that the "[t]echnology of the business is such that if any part of a supply of electric energy comes from outside of a state it is, or may be, present in every connected distribution facility." 324 U.S. at 529. When end users are served by those distribution facilities connected to the interstate grid, they are, therefore, necessarily consuming energy from the pool served by all generators on the interstate grid. *See id.*

New York's argument that some of the energy flowing to a retail customer is identifiably intrastate, and hence beyond FERC's jurisdiction, is simply wrong. Regardless of the proximity of generator and user, if both are connected to an interstate grid it is not possible for the user to draw only on that generator without consuming any energy that originated out of state. *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 381 (1983). ("[I]t is difficult to say with any confidence that the power [an interconnected utility] provides to its [customers] at any particular moment originated entirely within the State."); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 336 (1982) ("So long as the electricity produced at [a generator] continues to flow through [an interconnected] transmission network, it will be impossible to contain that electricity within [the generator's state] in any physical sense."); *Northern States Power Co. v. FERC*, 30 F.3d 177, 179 (D.C. Cir. 1994) ("There is no way to determine what

path electricity actually takes between two points or indeed whether the electricity at the point of delivery was ever at the point of origin."). None of the sources New York cites suggests otherwise.[8]

New York's converse suggestion (NY Br. at 43), based on the metaphor of red and white blood cells, that FERC's jurisdiction extends only to the particular electrons in each transmission that travel interstate, is contrary to this Court's interpretation of section 201 and is obviously unworkable. In *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964), the Court deemed all sales of energy at issue "in interstate commerce" even though only some of the energy came from outside the state in which it was consumed. *See id.* at 208-09 (wholesale sale of energy generated in California, Nevada, and Arizona to the city of Colton, California, was "in interstate commerce"); *see also California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) (sale of natural gas intended for use (and used in part) by the pipeline in its operations was within the FPC's wholesale jurisdiction because such gas commingled with other gas sold for resale). The identification and separate regulation of electrons from interstate sources is impossible: "There is a commingling of energy from different sources at a bus [a point of interconnection] with the result that the energy which flows away from such bus is so fully commingled as to consist of energy which has entered such bus both from

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[8] The technical sources cited in footnote 28 of New York's brief do not support the contention that a customer's use of electric energy is or can be served exclusively by intrastate generation. The cited portion of *Introduction to Electrical Theory and Power Transmission* suggests only that a utility can generate the *amount* of energy necessary to offset the *amount* consumed by its native load, not that the energy consumed by the native load is somehow the "same" energy generated by the utility. *See* Robert H. Sarikas, *Introduction to Electrical Theory and Power Transmission*, 70, 82 (1995). New York's other citation, D. Fink & H. Beaty, *Standard Handbook for Electrical Engineers* 2-4 (1987), is unrelated to the point at issue.

interstate and intrastate sources." *FP&L*, 404 U.S. at 461-63; *see also Florida Power & Light Co.*, 37 F.P.C. at 550. To put this in the language of section 201(c), *whenever* a quantity of electric energy is "transmitted from [a generating facility in] a [connected] State," some part of the electric energy is "consumed at any point outside thereof . . . ." 16 U.S.C. § 824(c). Therefore, as Justice Douglas explained in dissent in *FP&L*, "every privately owned interconnected [transmission] facility in the United States . . . is within the FPC's jurisdiction." 404 U.S. at 471. Nothing in the words of section 201(c) requires that the definition of interstate transmission be applied, unworkably, to only the portion that is so consumed.[9]

Finally, the fact that all transmission over an interstate grid is "in interstate commerce" does not render section 201(c) "nugatory" as an original matter. (*See* NY Br. at 44-45.) Three states—Alaska, Hawaii, and part of Texas—remain unconnected to the interstate grids today, and many transmission facilities were not yet interconnected when the FPA was enacted to deal with the growing phenomenon of interconnection. *See supra* pp. 6-11. The transmissions falling within FERC's jurisdiction grew dramatically after 1935 because of increases in interconnection, not because of any change in the FPA or its interpretation.[10]

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[9] California's brief directly contradicts New York on this point, stating "when any part of the electricity moves across state lines, transmission all the way to the retail customer is transmission in interstate commerce." (Cal. Br. at 11.)

[10] New York's reliance on *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395 (1975), is thus misplaced. The argument in that case was that changes in policy and technology justified giving the statute a meaning fundamentally different than its language allowed. *Id.* at 422-23. Neither FERC nor Enron has made any such argument here.

B. FERC Has Jurisdiction Over Interstate Transmissions for Both Wholesale and Retail Sales, Notwithstanding the States' Jurisdiction Over the Retail Sales Themselves.

New York argues that the FPA draws a "bright line" between wholesale sales and retail sales and that every activity that serves a retail sale, including interstate transmission, is therefore reserved to the states' regulatory authority. New York says this is so regardless of whether the transmission service is sold for a separate charge or is bundled with the price of the energy at retail.[11] But this is a misreading of the plain language of the statute. FERC's jurisdiction over transmissions of energy in interstate commerce does not depend on its jurisdiction over wholesales or on how the transmitted electricity is sold; the "bright line," which provides a clear and workable rule for dividing federal and state jurisdiction over *sales*, has no application to interstate transmissions. This is made clear by the language of section 201(b), this Court's precedents, and the legislative history.

Section 201(b) of the FPA, 16 U.S.C. § 824(b), contains two separate grants of jurisdiction. The first gives FERC jurisdiction over all "transmission of electric energy in interstate commerce," and the second gives FERC jurisdiction over "the sale of electric energy at wholesale in interstate commerce." Although Congress limited FERC's jurisdiction over "sales" to those "at wholesale," it omitted that limitation from the grant of jurisdiction over "transmission." The different language in the two grants was intentional and must be given effect. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("where Congress includes

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[11] Enron agrees with New York (NY Br. at 35-36) that whether the transmission charge and the electricity charge are bundled is a matter of bookkeeping and billing that does not affect the allocation of jurisdiction. Interstate transmission, however it is billed, is a separate activity subject to distinct regulatory jurisdiction.

particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal quotations and citation omitted).

This Court has interpreted the nearly identical parallel provision of the Natural Gas Act (NGA) to give FERC jurisdiction over all interstate transportation of natural gas, whether the transported gas is sold at wholesale or retail. Section 1(b) of the NGA grants jurisdiction over "[1] the transportation of natural gas in interstate commerce, [and] [2] the sale in interstate commerce of natural gas for resale." 15 U.S.C. § 717(b). In *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), the Court explained that "[e]ach of the these is an independent grant of jurisdiction and, though the Act's application to 'sales' is limited to sales of interstate gas for resale, the Act applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale." 406 U.S. at 636. The Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981). That practice should be applied in resolving this basic structural point, which is common to both statutes, the later of which (the NGA) was modeled on the earlier. Thus, even if the FPA language were not clear on its face, this Court's interpretation of the nearly identical NGA language would be controlling. *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990) ("Once [this Court has] determined a statute's clear meaning, [it] adhere[s] to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.").

In fact, Congress rejected a proposal to rearrange the statute that was apparently intended to limit the FPC's

jurisdiction over transmissions to transmissions for wholesales. The National Association of Railroad and Utility Commissioners (NARUC, a predecessor of a petitioner in this case) proposed an amendment to the language that became section 201(b) that would have applied the "at wholesale" limitation to FERC's transmission jurisdiction: "The provisions of this title shall apply only to the transmission and sale at wholesale of electric energy in interstate commerce." *Hearings on H.R. 5423*, at 1660 (emphasis deleted). Congress did not accept this change and enacted the broader jurisdictional grant contained in section 201(b).

New York correctly states that the FPA drew a "bright line" between wholesale and retail sales. But none of the cases cited by New York suggests that this bright line applies to interstate *transmissions*. *See Public Util. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927) (state could not regulate "sale" of electric energy by Rhode Island company to Massachusetts company for resale); *Pennsylvania Gas Co. v. Public Serv. Comm'n*, 252 U.S. 23, 28 (1920) (state could regulate retail "sale" of interstate gas to local customers); *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298, 310 (1924) (regulation of "sale" of gas to retail customers, not "transportation"). An important doctrine arising out of these cases was "that the retail *sale* . . . was subject to state regulation" even if the commodity had been transmitted in interstate commerce, *see Arkansas Elec.*, 461 U.S. at 377 (emphasis added), but none of the cases suggests the need for a "bright line" dividing interstate transmissions.[12]

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[12] New York cites (NY Br. at 29) *Southern California Edison*, 376 U.S. 205, but that case and the cases cited therein hold only that the state may regulate rates for local retail sales, not that FERC's jurisdiction over the transmission of electric energy (or the transportation of natural gas) is limited to wholesale transmission (or transportation). *See Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 U.S. 498, 504-05 (1942);

This is consistent with the reason for the bright line: to make it easy to ascertain where interstate commerce would be deemed to end, thereby avoiding a case-by-case evaluation of out-of-state and in-state interests in particular sales. Any retail sale was to be deemed subject to state jurisdiction, even though the electricity had been transmitted (and perhaps previously sold) in interstate commerce. *See Arkansas Elec.*, 461 U.S. at 375-77; *Pennsylvania Gas*, 252 U.S. at 28. But this bright line has no logical application to transmission, because all interstate transmissions are by definition in interstate commerce; the line that needs drawing is, instead, between transmission and local distribution. *See infra* pp. 28-31.[13]

New York tries to override the clear language of the FPA by selectively citing legislative history. Of course, the Court does "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United States*, 510 U.S. 135, 147-148 (1994).[14] In any event, the legislative

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Panhandle E. Pipeline Co. v. Pub. Serv. Comm'n, 332 U.S. 507, 517 (1947).

[13] It made sense to give the FERC jurisdiction over all interstate transmissions because there is no physical distinction between interstate transmissions that serve wholesale and retail sales. The terms of sale are matters of contract. The transmissions, whether for wholesale or retail, compete for the use of the interstate grids, and it is that competition for usage that FERC has sought to regulate by mandating that an "open access" tariff be filed by all owners and operators of the facilities. FERC's important objective, as shown *infra* pp. 39-44, can only be accomplished by federal regulation, and Congress built into the FPA the jurisdiction over interstate transmissions necessary to enable FERC to do so.

[14] *See also Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and . . . prevents the effectuation of congressional intent."); *Garcia v. United States*, 469 U.S. 70, 78 (1984) ("We are not willing to narrow the plain meaning of even a criminal statute on the basis of a gestalt judgment as to what Congress probably intended.");

history specifically discussing jurisdiction over interstate transmission clearly indicates that plenary FERC jurisdiction was a separate purpose of the FPA.[15] By 1935, the fledgling development of regional interstate electric power systems had "outgrown the States as to the . . . transmission of power, not the distribution." *See* Ryan-DeVane Memorandum at 798. "Electricity crossing State lines [was] in a no-regulation land, unrestrained by the power of the State which may not constitutionally control it, and unrestrained by the power of the Federal Government, which ha[d] not attempted to control it." *Id.* at 797. Congress enacted the FPA to establish federal regulation over the "uncontrolled and uncoordinated . . . transmission of electricity . . . [which] obstruct[ed] the free flow of electric energy in interstate commerce," *id.* at 800, and to encourage the further development of coordinated interstate grids, *see id.* ("the need for a centralized control of the coordination process furnishes a formidable basis for the exercise of congressional power provided in title II of the present bill").

The passages from the legislative record that New York cites discuss the retail/wholesale distinction only in the context of jurisdiction over sales; they do not address jurisdiction over transmission.[16] For example, the 1935

Tennessee Valley Auth. v. Hill, 437 U.S. 153, 184 n.29 (1978) ("When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning").

[15] Contrary to New York's suggestion, the FPA was enacted to do more than create federal authority to set wholesale rates: "I do not have to tell the members of this committee that the actual fixing of [wholesale] rates is but a small part of the regulation sought to be accomplished by this bill." *Hearings on H.R. 5423*, at 2170 (DeVane testimony); *see also* S. Rep. No. 74-621, at 17 (1935) (explaining that the purpose of the FPA was to fill not only the "Attleboro gap," but also to reach "[o]ther features of this interstate utility business that are equally immune from State control either legally or practically").

[16] The same is true of amicus California's discussion of legislative history. For example, California cites Solicitor DeVane's statement (Cal.

Senate Report's discussion of the exclusions from federal jurisdiction, cited by New York (NY Br. at 23), focuses on the "retail sale of . . . energy in local distribution." S. Rep. No. 74-621, at 48 (1935). FPC Solicitor DeVane's much-cited comments contain considerable discussion in very general terms about the preservation of state authority, but none of his comments about jurisdictional boundaries suggests a limit on FERC's authority to regulate the rates, terms, and conditions of the transmission of electric energy in interstate commerce. *See Hearings on H.R. 5423*, at 497-98 (discussing limits on "retail" rates in the context of a discussion on the "retail sale" of electric energy). As for the few citations that do discuss transmission, New York either cites the legislative record out of context or, occasionally, misquotes it entirely. For example, New York twice mischaracterizes, by leaving off the final clause, the same statement of Solicitor DeVane about federal jurisdiction over transmission facilities. (*See* NY Br. at 22, 33.) He actually said that federal jurisdiction did not extend to "jurisdiction . . . over facilities used in local distribution or the transmission facilities that are used in connection with such local distribution *unless they are also part of the facilities that are used in interstate commerce.*" *Hearings on H.R. 5423*, at 548 (emphasis added). Leaving out the "unless"

Br. at 10-11): "The bill does not give the Commission jurisdiction over energy that is transmitted in interstate commerce by a particular company and sold by that company to consumers." The statement was made in a discussion of jurisdiction over retail and wholesale sales rates. When read in context, it is clear that Solicitor DeVane's statement simply distinguished between the FPC's authority to set wholesale sales rates and the states' authority to set retail sales rates, even when the energy sold at retail was "transmitted in interstate commerce." DeVane's comment does not suggest any limit on FERC's jurisdiction over the transmission of electric energy in interstate commerce.

clause dramatically changes the meaning, which is entirely consistent with section 201(b).[17]

C. FERC's Jurisdiction Over Interstate Transmissions Is Not Limited by Section 201(b)'s Exclusion of Facilities Used in "Local Distribution."

The FPA excludes from FERC's jurisdiction "facilities used in local distribution." 16 U.S.C. § 824(b). Amicus California makes the novel argument (Cal. Br. at 8 *et passim*) that *all* conveyance of electricity, from a generator wherever located, over facilities of any character, at whatever voltage, and regardless of state boundaries, is actually "local distribution" if the only sale is to a retail customer. According to California, "local distribution" is "a subset of . . . transmission in interstate commerce." (*Id.* at 8.) A transmission at high voltage over the interstate grid from generation facilities in New York to a distribution point in Ohio and thence to retail customers would all be "local distribution" unless there was an intervening wholesale. This argument, under which the local distribution exception would swallow most of FERC's jurisdiction over transmission, is contrary to the statute and this Court's established understanding of what it means.

The FPA makes it quite clear that "transmission" and "local distribution" are distinct activities. Section 201(b)

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[17] New York argues that in earlier briefs to this Court and before Congress FERC has taken the position now urged by New York. All of the examples noted by New York, however, merely confirm FERC's recognition of state jurisdiction over retail sales and the local distribution of electric energy; in none does FERC deny or limit its own jurisdiction over interstate transmissions. For example, New York claims (NY Br. at 28) that in a December 1944 brief the FPC "conceded that the states regulated *all aspects* of retail transactions" (emphasis added), but the brief in fact acknowledges only that states have jurisdiction over the rates for "*sale* to the ultimate consumer." FPC's December 1944 Brief in *CL&P* at 28 (emphasis added).

says, "The Commission shall have jurisdiction over [1] all facilities for [interstate] transmission . . . but shall not have jurisdiction . . . over [2] facilities used in local distribution or [3] only for the transmission of electric energy in intrastate commerce." The statute is quite evidently using "transmission" and "local distribution" to mean different things. Moreover, California's view would prove too much: by California's definition, *all* transmission facilities are "used in local distribution" (at least some of the time) and hence beyond FERC's jurisdiction. If Congress actually meant, as California contends, to exclude all interstate transmissions for retail sales, it could have said so much more directly.

This Court has previously observed that there is a clear distinction between "transmission" and "local distribution" facilities (although the exact location of the line between them has been a matter of some specific disputes). In *CL&P*, on which California relies, the issue came down to whether the transformer facilities used in "the process of reducing energy from high voltage to low voltage in subdividing it to serve ultimate consumers," 324 U.S. at 534, were "transmission" facilities or "local distribution" facilities. The Court had no difficulty with the general distinction between the two:

> [T]ransmission . . . extends from the generator, where generation is complete to the point where the function of conveyance in bulk over a distance, which is the essential characteristic of 'transmission,' is completed and the process of subdividing the energy to serve ultimate consumers, which is the characteristic of 'local distribution,' is begun.

Id. at 533 (citations omitted). The Court instructed the court of appeals to remand the case to the FPC to determine on which side of the line the particular transformer facilities at issue fell. *Id.* at 534-36; *see also Southern California Edison*, 376 U.S. at 210 n.6 ("Whether facilities are used in

local distribution . . . involves a question of fact to be decided by the FPC as an original matter.").[18] The Court's reasoning and the result in *CL&P* make it clear that "transmission" and "local distribution" are essentially different activities.

The Court has drawn a similar distinction under the parallel provision of the NGA. Section 1(b) of the NGA gives FERC jurisdiction over the "transportation of natural gas in interstate commerce," but not over "the local distribution of natural gas . . . to the facilities used for such distribution . . . ." 15 U.S.C. § 717(b). In *FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950), the utility argued, as California does here, that all of its facilities used to transport gas to its retail customers were facilities for local distribution, exempt from federal jurisdiction even if used to transport gas in interstate commerce. *See id.* at 469-70. The Court rejected this "strained" interpretation, noting that it would exempt every pipeline owned by a vertically integrated utility and used to serve its retail customers. *Id.* at 470-71. The Court held that Congress intended by the language of the statute to create a clear distinction between the two types of facilities—"transportation" facilities carrying gas at high pressure and "local distribution" facilities carrying gas at reduced pressures to local users—even when both types of facilities are being used to serve a utility's own retail customers. *See id.*

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[18] Contrary to California's argument (Cal. Br. at 18-19), the Court's n.6 in *Southern California Edison* does not suggest that any facility "used" in retail service is *ipso facto* a "local distribution" facility. The Court merely noted that the FPC had found, in a particular instance, that certain facilities were *not* engaged in local distribution because they were used to serve wholesale customers. That FPC reasoning makes perfect sense and does not imply that, conversely, all facilities used to serve retail customers are local distribution rather than transmission facilities. On the contrary, the Court made clear that the line between "transmission" and "local distribution" facilities is to be determined by the expertise of the agency, applied to the particular facts of each case, and is not a simple bright line between wholesale and retail.

California asserts (Cal. Br. at 23-24 & n.16) that *CL&P* casts doubt on the reasoning of *East Ohio Gas*. But both cases recognize distinctions—indeed, roughly parallel distinctions—between facilities used to carry a commodity in bulk over long distances and facilities used for local distribution to customers. *Compare East Ohio Gas*, 338 U.S. at 470-71 *with CL&P*, 324 U.S. at 533-34. Both cases concerned which side of the line particular intermediate facilities fell on, and the Court held in *CL&P* that the analysis of particular gas facilities in *East Ohio Gas* did not control the analysis of particular electric facilities in *CL&P*. *East Ohio Gas* is also not, as California argues (Cal. Br. at 24 & n.16), inconsistent with the (much earlier, pre-NGA) decision in *Pennsylvania Gas*, 252 U.S. 23. *Pennsylvania Gas* held only that the states had authority to regulate retail "sales" because they were a matter of local concern, *see id.* at 28; it did not hold that states have the power to regulate interstate transmissions for those sales. To the extent Congress "adopted" *Pennsylvania Gas* in the FPA, it did so by leaving retail "sales" jurisdiction to the states.

Congress later overturned the outcome in *East Ohio Gas* by amending the NGA to add section 1(c), 15 U.S.C. § 717(c), which now exempts from federal regulation an entity that receives gas at or within the boundaries of a state if all of the gas is used within the same state. This section, known as the Hinshaw Amendment, which has no parallel in the FPA, does not alter the distinction between transportation of gas (or transmission of electricity) and local distribution. It merely implements an overriding policy that gas companies engaged entirely in in-state activities should be subject only to state regulation. There was inserted into the Senate Report on this legislation the phrase "as always has been intended," *see* S. Rep. No. 83-817, at 1-2 (1953), but this does not retroactively alter the meaning of the NGA's original language, particularly the language with respect to the distinction between transportation and local distribution, which was not changed. *See Mackey v. Lanier Collection*

Agency & Serv., Inc., 486 U.S. 825, 839 (1988) (opinion of "later Congress as to the meaning of a law enacted 10 years earlier does not control the issue"); *United States v. Price*, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

II. FERC REGULATION OF ACCESS TO AND USAGE OF THE INTERSTATE GRIDS DOES NOT USURP ANY JURISDICTION THAT THE FPA RESERVED TO THE STATES.

The Declaration of policy in section 201(a) of the Federal Power Act provides:

> Federal regulation of . . . the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

16 U.S.C. § 824(a). Following this declaration, section 201(b) gives FERC jurisdiction over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce "but . . . not [over] any other sale of electric energy" and not over "facilities used in local distribution." 16 U.S.C. § 824(b). New York contends that Orders 888 and 888-A, insofar as they regulate transmissions of electric energy for retail sales, encroach upon state authority to regulate such sales. Amicus California contends that interstate transmission facilities become "local distribution" facilities when used for transmission of energy for retail sales and the orders therefore violate the states' reserved right to regulate local distribution.

Both of these arguments are wrong. FERC's exercise of its authority to regulate the terms and conditions of interstate

transmissions, an authority expressly granted by the statute, sets conditions that the states may be required to take into account in regulating retail sales, just as they must take into account FERC-fixed wholesale prices, but it does not usurp state regulation of rates for retail sales as such, or any state authority over retail sales. And FERC has made it entirely clear that it has not attempted to regulate local distribution facilities.

A. FERC's Regulation of Access to and Usage of the Interstate Grids Does Not Encroach Upon State Regulation of Sales of Electric Energy at Retail.

New York places far more weight on the Declaration of Policy in section 201(a) than it can properly bear. The section declares that *federal* regulation of interstate transmission of electric energy is "necessary in the public interest." To the extent that this policy is limited by reference to matters "subject to regulation by the states," the Court has made it clear that this general policy limitation yields to the specific grants of jurisdiction elsewhere in the statute. *See Southern California Edison*, 376 U.S. at 215 ("Section 201(b) embodies a clear grant of power, and we have held that [section] 201(a) was merely a 'policy declaration . . . of great generality. It cannot nullify a clear and specific grant of jurisdiction, even if the particular grant seems inconsistent with the broadly expressed purpose.'") (quoting *CL&P*, 324 U.S. at 527); *United States v. Public Utilities Comm'n*, 345 U.S. 295, 310-11 (1953) ("[Section] 201(a) was originally drafted as a declaration of 'policy,' and . . . [i]t cannot nullify a clear and specific grant of jurisdiction . . . ."). [19] FERC's orders have not encroached on any jurisdiction granted or reserved to the states by the FPA.

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[19] New York's reliance (NY Br. at 11, 28, 37-41) on *Jersey Central Power & Light Co. v. FPC*, 319 U.S. 61 (1943), for the proposition that section 201(a) grants the states jurisdiction over interstate transmission of electric energy for sale at retail is incorrect. *Jersey Central* merely noted

1. FERC's Orders Do Not Regulate Sales of Energy at Retail.

FERC's orders do not purport to regulate any aspect of the terms and conditions on which any utility sells electric energy at retail. *See* Order No. 888 at 31,635-36, Pet. App. 131a-134a (describing main aspects of the order). FERC's orders deal with terms of access to and usage of the interstate grids. The orders respond to findings of pervasive undue discrimination by vertically integrated utilities against competing power suppliers. The OATT was designed to level the playing field by requiring transmission owners to take their transmission on the same terms they offered their competitors, including access, curtailment policies, service priority ("firm" versus "non-firm" service), price, and service options and flexibility.[20]

FERC's regulation of access to and usage of the interstate grids to remedy undue discrimination is not regulation of retail sales. New York argues that because the OATT covers rates charged by transmission owners for interstate transmission service, and because the rate for the interstate transmission service is a component cost that the state must take into account in establishing the charges to retail customers for electricity, the OATT regulates the sale of energy at retail. (*See* NY Br. at 7-8, 11-12, 28-33.) But

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that the policy set forth in section 201(a) had no application to the provisions of the FPA dealing with "corporate financial arrangements" and was properly considered in connection with the interpretation of the FPA provisions dealing with generation, transmission, and sale. *See id.* at 74-75. *Jersey Central* did not opine about the effect of section 201(a) with respect to generation, transmission, and sale, and did not hold that section 201(a) preserved any transmission jurisdiction to the states.

[20] Contrary to the impression that might be gained from New York's brief, the orders are not concerned exclusively, or even primarily, with transmission *charges*. Their central concern is terms of access and usage. *See TAPS*, Pet. App. 8a ("open access is the essence of Order[] 888"). *See infra* pp. 39-40.

the amounts that a local utility must or may charge its retail customers, the manner in which these amounts are presented on a retail bill, whether customers will be allowed to choose among energy suppliers, and all of the other terms and conditions of retail service remain matters wholly within the authority of each state.[21] To be sure, the states are not free to ignore FERC-established costs and conditions of interstate transmission insofar as these, under state law, affect retail charges. State rate regulation, if designed to allow the utility to recover its costs, must respect the rates set in tariffs filed with FERC for components of electric service that are within FERC's jurisdiction. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 969-70 (1986). But the fact that the utility must pay FERC-filed charges for some of the component costs it incurs, and that the state must recognize this, does not make the federal government a regulator of retail rates any more than does the Federal Communications Commission's regulation of the long-distance charges paid by utilities in the course of doing business.

The situation parallels the allocation of jurisdiction over wholesale and retail rates. FERC has undisputed jurisdiction over the former, and the states have undisputed jurisdiction over the latter. A FERC-filed wholesale rate for power establishes a cost component for a utility that obtains power as a buyer at wholesale at that rate. In such situations, the state is not at liberty, in setting retail rates based on a utility's costs, to ignore the FERC-filed wholesale rate. As this Court explained in *Nantahala*, in setting the retail rate, the state regulator must "recognize a FERC-approved [wholesale] price as a reasonable cost for purposes of retail ratemaking." *Id.* at 973. But the fact that FERC establishes wholesale rates that the states are required to honor in setting retail rates does not mean that FERC is itself regulating retail sales. This

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[21] This authority is of course subject to the constitutional rights of the regulated utilities. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

principle applies equally to interstate transmissions, which like purchases at wholesale, are necessary components of electricity service at retail. As New York acknowledges (NY Br. at 9), all that Order No. 888 requires is that "the states that have separately identified the commodity . . . must incorporate FERC's transmission rate into the non-commodity . . . portion of the retail bill."[22]

In requiring a tariff setting forth terms and conditions for transmissions in interstate commerce, FERC has exercised only its own proper jurisdiction. Any resulting effect on state regulation of retail rates is not a usurpation but a consequence of a proper exercise of federal authority.

2. *The Matters FERC Has Regulated in Orders No. 888 and 888-A Are Not "Subject to Regulation by the States."*

New York also argues that because the states have always regulated all aspects of the sale of electricity at retail, and because interstate transmission costs are one component that must be taken into account in setting charges to the retail customer, jurisdiction over interstate transmission is reserved to the states under section 201(a). (*See* NY Br. at 11-12, 27-28.) But the states have never regulated competitive access to and usage of the interstate grids. The need for such regulation did not arise in its present form until the 1980s, with the birth of competition among suppliers of electricity.

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[22] The Court has reached a similar conclusion under the NGA. In *LP&L*, the Court held that similar regulation by the FPC of access to and usage of interstate natural gas transportation facilities, pursuant to section 1(b) of the NGA, did not constitute retail ratemaking, and fell squarely within the FPC's jurisdiction over interstate transportation. *See* 406 U.S. at 637-38 ("[Section] 1(b) withheld from FPC only *rate-setting* authority with respect to direct [i.e., retail] sales. Curtailment regulations are not *rate-setting* regulations but regulations of the 'transportation' of natural gas and thus within FPC jurisdiction under the opening sentence of § 1(b) that 'the provisions of this Act shall apply to the transportation of natural gas in interstate commerce.'").

No form of regulation in which the states have ever engaged, or in which the FPA permits them to engage, would enable the states to provide for nondiscriminatory access to the interstate grids or for interstate transmission service on fair and equal terms for all users.

That such regulation was within the proper scope of federal power was implicitly recognized in the EPAct of 1992. In that legislation, to help address the access problems plaguing the system, Congress amended section 211 of the FPA, 16 U.S.C. § 824j, to authorize FERC to order utilities on a case by case basis to "wheel" power for other users over their interstate transmission facilities. The broader actions taken in the orders resulted from FERC's determination that a case-by-case approach was not sufficient to remedy the pervasive undue discrimination it had found. *See* Order No. 888 at 31,646-47, 31,673, Pet. App. 157a-159a, 191a-193a. FERC noted that its authority under section 206 to remedy undue discrimination was unaffected by the amendment of section 211. *See* 16 U.S.C. § 824k(e) (savings provision stating that section 211 "shall not be construed as limiting or impairing any authority of the Commission under any other provision of [the FPA]"); Order No. 888 at 31,673, Pet. App. 192a (section 211 "left unaltered the authorities and obligations of the Commission under sections 205 and 206 . . . to remedy undue discrimination"). Traditional state regulation of retail sales and local distribution facilities had no way of dealing with the access and usage issues that Order No. 888 addressed; FERC's orders are qualitatively unlike anything the states have ever done.[23]

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[23] New York's reliance (NY Br. at 20-21, 25) on FPA legislative history discussing the *Shreveport Rate Cases* to support its assertion that the FPA reserved jurisdiction to the states beyond that set out in section 201(b) is misplaced. The issue in *Shreveport* was the Interstate Commerce Commission's authority to set rates for *intra*state rail shipments, *see Houston, E. & W. Texas Ry. Co. v. United States*, 234 U.S. 342 (1914); FERC has not sought to do anything comparable to this. Nothing in the 1935 congressional discussion of *Shreveport* suggests that

B. The Orders Under Review Expressly Provide for Continued State Regulation of Facilities Used in Local Distribution.

Section 201(b) of the FPA leaves to the states jurisdiction over all "facilities used in local distribution." 16 U.S.C. § 824(b). These local distribution facilities are composed of distribution lines connecting retail customers with distribution hubs, at which the high voltage energy transmitted through the grid is converted into lower-voltage energy suitable for distribution and bulk electric energy is subdivided for distribution to retail customers. *See CL&P*, 324 U.S. at 533. Distribution facilities are quite distinct from the high-voltage transmission facilities that make up the interstate grids. *See id.*

Order No. 888 sets forth a seven-factor test for distinguishing between interstate transmission facilities and local distribution facilities, with the express purpose of observing the FPA's jurisdictional division. *See* Order No. 888 at 31,770-71, Pet. App. 281a-283a. California asserts (Cal. Br. at 7-18) that there is no physical distinction between "transmission" and "local distribution" and that an interstate transmission for a retail sale is a part of local distribution. But as Enron showed at pp. 28-31, *supra*, that assertion is wrong. *See* 16 U.S.C. § 824(b) (distinguishing between facilities used for "transmission" and facilities used in "local distribution"); *East Ohio Gas*, 338 U.S. 464 (rejecting argument that, when used to move energy for retail sale, local distribution facilities include interstate transmission facilities). There have been disputes from time to time about whether particular facilities belonged on the "transmission" or the "local distribution" side of the line, but there is no support for California's creative argument that there is no

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a state, seeking to regulate the total delivered price of goods to its customers, would be free to dictate charges for interstate shipments or to ignore interstate rates set forth in a tariff filed with the ICC.

line at all. There is a line, and it preserves plenary state jurisdiction over facilities used in local distribution.

III. ONLY FERC CAN PROVIDE FOR NONDISCRIMINATORY OPEN ACCESS TO THE INTERSTATE GRIDS.

The practical case for FERC Orders No. 888 and 888-A (and, indeed, for much more complete FERC regulation to secure open access, *see* Enron's brief as petitioner in No. 00-809) may be summarized as follows: (1) Traditional provision of electric service on a monopoly basis by vertically integrated utilities is being supplemented, as a result of congressional action and other factors, by a regime of competition among suppliers of electricity. (2) The new suppliers, including traditional utilities competing outside their native markets, are dependent on nondiscriminatory access to interstate transmission facilities. (3) Nondiscriminatory access can be assured only by requiring the owners and operators of interstate transmission facilities to (a) take transmission on the same terms and conditions as they offer to others, which in turn requires them to (b) publish (and take service pursuant to) open access tariffs covering the reservation of transmission capacity, scheduling of transmission service, the resolution of conflicting demands, the steps to be taken when system constraints require curtailment of transmissions, the charges for transmission, and other similar matters. (4) Because the facilities are connected into interstate grids, only FERC is in a position to impose a workable open access tariff requirement; attempts by the states to mandate nondiscriminatory open access—even if they were motivated to do so—would produce chaos.

FERC's action was needed to safeguard and promote the nationwide competition in the supply of electricity that Congress sought to foster through PURPA and the EPAct, since alternative suppliers cannot compete if they cannot

move their electricity into the markets where it is needed. This objective is even more important today than when Congress enacted these statutes. Several parts of the nation are currently facing electricity shortages made worse by the fact that capacity on the interstate grids is not always available to bring electricity from other parts of the country. *See* Rebecca Smith & John R. Emshwiller, *Down to the Wire: Why California Isn't the Only Place Bracing for Electrical Shock*, Wall St. J., Apr. 26, 2001, at A1; William Claiborne, *Energy Forecasts for Summer: No Blackouts But Price Spikes*, Wash. Post, Apr. 30, 2001, at A3.

The regulation needed to provide nondiscriminatory open access, which is provided in part in Orders No. 888 and 888-A, is not concerned exclusively or even primarily with dollar charges for transmission. It must deal with issues of equal, open, and transparent access to information about the physical state of the transmission grids, uniform procedures for reserving and scheduling transmission capacity, the provision and purchase of various ancillary services that may or may not be provided with transmission, and issues of response to system constraints. Such regulation depends on known rules, contained in a published tariff, that treat comparable suppliers or users comparably. *Cf. AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 221-22 (1998) (explaining that under the Communications Act every carrier must file a tariff showing all charges, classifications, practices, etc., for the purpose of preventing "unreasonable and discriminatory charges"). Without such published rules, suppliers and users that are dependent on the transmission facilities of others cannot plan, or compete, or offer the same degree of reliability as the transmission owners can promise, and no regulator can police transmission service against undue discrimination.

Only FERC is in a position to require the transmission-owning utilities to file and abide by the needed open access tariff. No state has ever attempted to exercise any such

power; there is no history of state regulation of the terms of access and use of interstate transmission facilities in order to assure appropriate and fair sharing by all competing users. And there are at least three reasons to believe the states could not do so.

First, any attempt by the states to provide detailed terms for access to the interstate grids would raise formidable issues under the dormant Commerce Clause. "[T]ransmission of energy is an activity particularly likely to affect more than one State, and its effect on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 351, 377 (1983). *Cf. Pennsylvania v. West Virginia*, 262 U.S. 553, 596-97 ("A state law . . . which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce—a prohibited interference."), *aff'd*, 263 U.S. 350 (1923). The Court has stated more than once that the FPA did not grant the states any regulatory powers that the Clause would otherwise have denied. *See Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 341 (1982) ("Nothing in the legislative history or language of the [FPA] evinces a congressional intent to alter the limits of state power otherwise imposed by the Commerce Clause") (internal quotations and citation omitted).

Second, state regulation of access to the interstate grids would almost inevitably tend to favor in-state uses. Amicus California acknowledges this outright. Its stated purpose for opposing FERC's orders is to obtain the power to allow California utilities to discriminate, in the use of the interstate grid, in favor of California's retail customers: "In times when transmission is short, because of equipment failure or capacity constraints, States commonly require electric utilities to protect first the retail customers to whom public

utility obligations are owed (and in whose interests the utility is given its service monopoly by State law)." (Cal. Br. at 29.)[24] Such a priority for California's retail customers (as compared, for example, with retail customers in another state who are also dependent on transmissions over facilities located in California) may or may not be the best outcome under given conditions, but the state itself is not in a good position to be the judge.[25]

The threat of such parochial state regulation at odds with broader national or regional interests is very real. A similar argument supporting discrimination in favor of in-state customers was upheld by the Eighth Circuit in *Northern States Power Co. v. FERC*, 176 F.3d 1090 (8th Cir. 1999), *cert. denied sub nom. Enron Power Mktg., Inc. v. Northern States Power Co.*, 528 U.S. 1182 (2000). There, the court considered the application of Order 888 to certain utilities' systematic preference for their own transmissions over those of their competitors when conditions of system constraint require curtailment of transmissions. *See* Order No. 888 at 31,748-50, 31,923-25, Pet. App. 274a-279a, 325a-330a. The court sustained their power to discriminate. 176 F.3d at 1093.[26]

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[24] Similarly, Texas has refused to connect to the interstate grids precisely to keep "its" substantial excess capacity to itself, preventing the surplus from being used to provide power to other parts of the country experiencing severe shortages. *See* Alexei Barrionuevo & Russell Gold, *Texas May Face a Glut of Electricity, But That Won't Aid Rest of U.S.*, Wall St. J., May 7, 2001, at A1.

[25] The Court has recognized this in considering the problem of curtailment in the context of transportation of natural gas: "The unavoidable conflict between producing States and consuming States will create contradictory regulations that cannot possibly be equitably resolved by the Courts." *LP&L*, 406 U.S. at 633-64.

[26] FERC opposed Enron's petition for a writ of certiorari in that case, No. 99-916, in part on the ground that the matter should await the D.C. Circuit's decision in the present case, and the petition was denied. 528 U.S. 1182 (2000).

Third, and most fundamental, regulation by all of the states that are connected to each interstate grid simply cannot be expected, in the aggregate, to provide workable rules for access to and usage of the grid. As explained above, the physical flow of power occupies the whole grid because every connected user draws physically on every connected supplier. If there are to be rules governing access to and usage of the grid by competing suppliers and competing users, the rules must as a practical matter be the same or compatible for the entire grid. State-by-state regulation is unworkable. *Cf. Healy v. The Beer Inst.*, 491 U.S. 324, 336 (1989) (burden on interstate commerce depends on "how the . . . [state] statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation"). State regulation could lead to a balkanization of the grids that could impair effectiveness and reliability and thwart both competition and service to users.

In sum, the problem of access to and usage of the grid by the competing power suppliers that have proliferated in the past two decades is beyond the power of the states to police. The FPA, however, clearly provides FERC with the jurisdiction necessary to prevent this undue discrimination in interstate transmission.[27] New York's argument to the contrary would mean that no regulator at all has jurisdiction to address these critical problems.[28]

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[27] FERC's historical jurisdiction over interstate transportation of natural gas played a similarly increased role when new forms of competition led FERC to order open access to natural gas pipelines. *See Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied sub nom., Interstate Natural Gas Ass'n of America v. FERC*, 485 U.S. 1006 (1988)).

[28] This Court said in *LP&L*, "[W]hen [the Court is] presented with an attempt by the federal authorities to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation." *LP&L*, 406

Finally, there is no reason to accept New York's argument (NY Br. at 46-48) that FERC regulation of interstate transmission for retail sales will adversely affect maintenance, customer service, and reliability of the grids, and that FERC will set inadequate rates for transmission, creating inadequate incentives for construction of new transmission lines. Contrary to New York's assertions, there is every reason to believe that it is federal, not state, regulation that is needed to improve the grids and make them fully adequate to meet present and future demand. *See* John J. Fialka & Bob Davis, *Cheney Panel Considers Helping Utilities Expand Hydro Power Transmission Lines*, Wall St. J., May 3, 2001, at A2:

> The task force on energy strategy, led by Vice President Dick Cheney . . . is expected to urge [FERC] to boost the rates that utilities can charge customers for transmitting electricity. The higher rates would encourage the construction of new power lines.
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> * * * *
>
> In the case of electricity transmission, the White House has been looking for ways to unclog the nation's power grid without having the federal

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U.S. at 641 (quoting *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 28 (1961)) (internal quotations omitted); *see also id.* at 631 ("[I]n a borderline case where congressional authority is not explicit [, the Court] must ask whether state authority can practicably regulate a given area and, if . . . it cannot, then [the Court is] impelled to decide that federal authority governs.") (internal quotations and citation omitted). In 1935, the Senate Report explained that the purpose of the FPA was to fill not only the "Attleboro gap," but also "[o]ther features of this interstate utility business that are equally immune from State control either legally or practically." S. Rep. No. 74-621, at 17. This Court noted that "Congress' purpose in 1935 was to fill a regulatory gap, not to perpetuate one." *Arkansas Elec.*, 461 U.S. at 384. There is no reason not to interpret the FPA to allow FERC to fill an important gap.

> government string new power lines and build new stations as it once built the interstate highway system.
>
> The White House wants to encourage utilities to speed construction by increasing the regulated return on their investment in new transmission facilities . . . .[29]

At the very least, federal regulators have as strong an incentive as any state regulator to focus on long-range solutions to the problem of energy transmission, rather than on protecting particular groups of users.

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29 In fact, on March 14, 2001, FERC issued an order proposing several initiatives "to protect consumers from supply disruptions . . . [i]n light of the severe electric energy shortages facing California and other areas of the West in recent months." The order also invited comments on, among other things, (1) premiums on equity returns and accelerated depreciation periods for projects that increase transmission capacity, and (2) recovery of a return on non-capital intensive expenditures made to increase transmission capacity on constrained interfaces (e.g., technologies that improve voltage control and power flows). *See Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States*, 94 F.E.R.C. ¶ 61,272, at 61,967 (2001).

CONCLUSION

The decision of the court of appeals sustaining FERC's orders should be affirmed as to the claims asserted in New York's petition.

Respectfully submitted,

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